

THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

JULIUS TERRELL, as an individual and as a  
representative of the class,

Plaintiff,

v.

COSTCO WHOLESALE CORP.,

Defendant.

NO. 2:16-cv-01415-JLR

**PLAINTIFF'S RESPONSE BRIEF  
REGARDING *SYED II***

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## I. INTRODUCTION

Defendant has provided no compelling reason why this matter should not be remanded. No party is arguing that this Court has jurisdiction,<sup>1</sup> and the black letter law requires that in this circumstance, the matter “shall be remanded.” 28 U.S.C. § 1447(c). This court should therefore remand, without reaching the question of jurisdiction.

## II. ARGUMENT

The most striking feature of Defendant’s brief is its failure to address the Ninth Circuit’s opinion in *Polo v. Innoventions Int’l, LLC*, 833 F.3d 1193, 1198 (9th Cir. 2016) or the text of 28 U.S.C. § 1447(c). Under the plain language of federal law, this court must remand. “If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.” 28 U.S.C. § 1447(c) (emphasis added). The statute, which explicitly requires remand, lists no exceptions. The Ninth Circuit has confirmed that this language is mandatory. *Polo* 833 F.3d 1193, 1198.

In spite of the plain language of the law, Defendant asserts the Court has discretion. Citing a case from 1991, Defendant argues that Section 1447(c) contains an unwritten futility exception. ECF No. 54 at 5, citing *Bell v. City of Kellogg*, 922 F.2d 1418 (9th Cir. 1991). However, in *Polo*, the Ninth Circuit noted that *Bell* “may no longer be good law,” because the Supreme Court, after *Bell* was decided, held that “the literal words of § 1447(c) on their face, give no discretion to dismiss rather than remand.” *Id.* at 9-10, quoting *Int’l Primate Prot. League v. Adm’rs of Tulane Educ. Fund*, 500 U.S. 72, 89 (1991).<sup>2</sup>

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<sup>1</sup> Defendant continues to argue that establishing standing is Plaintiff’s burden, but neither of the cases Defendant cites actually addresses that question. In both cases, the plaintiff argued that standing existed, without addressing burden. Furthermore, in both cases, dismissal was *without* prejudice. See *Zaitzeff v. City of Seattle*, No. 2:16-CV-00244-BAT, 2016 WL 6084930, at \*7 (W.D. Wash. Oct. 18, 2016); *Kaufman v. JPMorgan Chase Bank, N.A.*, No. 2:14-CV-02217-ODW, 2014 WL 2094284, at \*4 (C.D. Cal. May 20, 2014).

<sup>2</sup> Defendant argues that *Bell* has not been explicitly overruled, but what the *Polo* court made clear is that *Bell* is inconsistent with a later-decided Supreme Court case, *Int’l Primate Prot. League*. That later-decided higher court decision is reason to disregard *Bell*.

1 Reading a “futility exception” into the plain language of Section 1447(c) is particularly  
 2 problematic in this case. Defendant invoked this Court’s jurisdiction, and then immediately  
 3 claimed this Court has no jurisdiction. Defendant now asks this Court to declare that  
 4 Washington state courts would not have jurisdiction either. Not only is Defendant’s strategy  
 5 self-contradictory, but taken to its logical conclusion it also would allow Defendants to pick  
 6 and choose between state and federal forums for the sole purpose of deciding issues of state  
 7 law. This should not be countenanced.

8 Even if there was a futility exception—which the Ninth Circuit expressed great  
 9 skepticism about in *Polo*, and which this Court should not examine—it would not apply here.  
 10 In discussing this hypothetical unwritten exception, the Ninth Circuit said that it would only  
 11 apply when there was “absolute certainty” that the action would be dismissed in state court. *Id.*  
 12 at 10. Defendant does not come close to clearing the high bar of “absolute certainty.” Article III  
 13 applies only in federal court, not in state court. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617  
 14 (1989) (“We have recognized often that the constraints of Article III do not apply to state  
 15 courts, and accordingly the state courts are not bound by the limitations of a case or  
 16 controversy or other federal rules of justiciability even when they address issues of federal  
 17 law”); *To-Ro Trade Shows v. Collins*, 100 Wash. App. 483, 489 (2000) *aff’d*, 144 Wash. 2d 403  
 18 (2001) (“Washington State superior courts are courts of general jurisdiction and are not  
 19 constrained by subject matter jurisdiction under Article III.”)

20 It would be improper for this Court to superimpose Article III requirements on  
 21 Washington law. Washington does not have a standing requirement which is analogous to  
 22 injury-in-fact and Washington state courts’ jurisdiction is far broader than Article III. *Trinity*  
 23 *Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.*, 176 Wash. App. 185, 198–99, (2013).<sup>3</sup>  
 24 Standing in Washington court is a non-jurisdictional, waivable issue. *Id.*

25  
 26 <sup>3</sup>“In federal courts, a plaintiff’s lack of standing deprives the court of subject matter jurisdiction...By contrast, the Washington Constitution places few constraints on superior court jurisdiction. Accordingly, if a defendant waives the defense that a plaintiff lacks standing, a Washington court can reach the

1 A Washington state court also would not dismiss this case simply because it involves a  
 2 federal statute. Washington state courts have heard causes of action under the FCRA, with one  
 3 even reaching the Washington State Supreme Court. *Rasor v. Retail Credit Co.*, 87 Wash. 2d  
 4 516 (1976). Nor will a lack of monetary damages be a concern; Washington state courts have  
 5 allowed a case under the Washington Fair Credit Reporting Act (“WFCRA,” a state analog to  
 6 the FCRA) to move forward, *even when actual damages had not been alleged. Handlin v. On-*  
 7 *Site Manager Inc.*, 187 Wash. App. 841, 849 (2015) (rejecting argument that the complaint was  
 8 insufficient because it did not specifically allege actual damages, and explaining that the  
 9 WFCRA is enforced through the Consumer Protection Act, where “[m]onetary damages need  
 10 not be proved; unquantifiable damages may suffice.”)(quotation omitted). A state court violates  
 11 the Supremacy Clause when it refuses to hear federal causes of action while providing a forum  
 12 for similar state causes of action, because “a state court may not deny a federal right, when the  
 13 parties and controversy are properly before it, in the absence of valid excuse.” *Howlett By and*  
 14 *Through Howlett v. Rose*, 496 U.S. 356 at 369 (1990). Further, there is precedent for state  
 15 courts hearing FCRA claims under 1681b(b)(2) even when federal courts have declined to do  
 16 so. *See Lee v. Hertz Corp.* (San Francisco Cnty. Super. Ct., Apr. 5, 2017) (attached as Ex. 1).  
 17 The result will be the same here, under Washington law.

18 The off-point cases cited by Defendant do not counsel otherwise. *Grant Cnty. Fire Prot.*  
 19 *Dist. No. 5 v. City of Moses Lake*, 150 Wash. 2d 791 (2004), *Allan v. Univ. of Wash.*, 140  
 20 Wash. 2d 323 (2000) and *Trepanier v. City of Everett*, 64 Wash. App. 380 (1992) all address  
 21 statutory standing under specific Washington laws (the Uniform Declaratory Judgments Act,  
 22 the Washington Administrative Procedures Act, and State Environmental Policy Act,  
 23 respectively), and are therefore entirely off point. *Save a Valuable Env’t (SAVE) v. City of*  
 24 *Bothell*, 89 Wash. 2d 862 (1978) deals with associational standing for a non-profit, and is  
 25 similarly inapposite. Defendant cites *Nelson v. Appleway Chevrolet, Inc.*, 160 Wash. 2d 173,

26 merits. Therefore, in Washington, a plaintiff’s lack of standing is not a matter of subject matter  
 jurisdiction.” *Id.* (citations omitted).

1 186, 157 P.3d 847, 853 (2007) for the proposition that Washington courts require economic  
 2 injury, but the case actually holds that standing requires the plaintiff “suffered an injury in fact,  
 3 *economic or otherwise.*” *Id.* (emphasis added). Defendant has cited no cases which establish  
 4 that Washington courts follow *Spokeo* or are bound by Article III, because none exist.

5 In asserting that this case should be dismissed with prejudice, Defendant fails to explain  
 6 how, if this Court does not have subject matter jurisdiction, it could ever adjudicate this matter  
 7 on the merits. The Ninth Circuit has made clear that dismissal for lack of jurisdiction must be  
 8 without prejudice, and Defendant’s cases are not contrary.<sup>4</sup> *Siler v. Dillingham Ship Repair*,  
 9 288 F. App’x 400, 401 (9th Cir. 2008).

10 Finally, the “principles” of the Class Action Fairness Act (“CAFA”) do not mandate a  
 11 different result. No provision in CAFA mandates dismissal in this case, and no court has  
 12 dismissed rather than remanding an action because of the CAFA’s “principles.” And Congress  
 13 can no more expand federal courts’ Article III jurisdiction through a legislative enactment like  
 14 CAFA than it can through the provisions of the FCRA at issue here. Subject matter jurisdiction  
 15 is circumscribed by the Constitution and cannot be expanded by Congress, no matter the title of  
 16 the Act relied upon. Defendant cannot coherently argue that Article III trumps Congress’s  
 17 intent in passing the FCRA, but not Congress’s intent in passing CAFA.

18 This matter should be remanded. 28 U.S.C. § 1447(c).  
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22 <sup>4</sup> In *Cleveland Police Patrolmen’s Ass’n v. City of Cleveland*, No. 1:15-CV-1917, 2016 WL 70570  
 23 (N.D. Ohio Jan. 6, 2016) the Plaintiff had improperly filed a notice of voluntary dismissal at a time  
 24 when it was not procedurally available. The Court, with no consideration of § 1447, converted it into a  
 25 dismissal with prejudice. In *Middlesex Surgery Ctr. v. Horizon*, No. CIV.A. 13-112 SRC, 2013 WL  
 26 775536 (D.N.J. Feb. 28, 2013) the Court dismissed for failure to state a claim, not a lack of standing. In  
*Impress Commc’ns v. Unumprovident Corp.*, 335 F. Supp. 2d 1053, 1055 (C.D. Cal. 2003), the court  
 found both a lack of standing and a failure to state a claim, and chose to dismiss on the merits, with no  
 consideration of § 1447. *Woods v. Caremark, L.L.C.*, No. 4:15-CV-00535-SRB, 2016 WL 6908108  
 (W.D. Mo. July 28, 2016) is (a) incorrectly decided, and irreconcilable with § 1447 and (b) dependent  
 upon Eighth Circuit precedent which is inconsistent with *Polo* and which does not apply here.

1 RESPECTFULLY SUBMITTED AND DATED this 28th day of April, 2017.

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CERTIFICATE OF SERVICE

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